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10
11 **UNITED STATES DISTRICT COURT**

12 **CENTRAL DISTRICT OF CALIFORNIA**
13

14 NEOFONIE GMBH, a German
15 corporation,

16 Plaintiff,
17

vs.

18 ARTISSIMO DESIGNS LLC, a
19 Delaware limited liability company,

20 Defendant.
21

22

AND COUNTERCLAIM
23

24 Case No.: 8:17-cv-00772 CJC (JDEx)

25 **REPLY OF NEOFONIE GMBH
TO DEFENDANT'S OPPOSITION
TO MOTION IN LIMINE TO
EXCLUDE LAY WITNESSES
FROM GIVING AN EXPERT
OPINION**

26 Hon. Cormac J. Carney

27 Hearing: January 14, 2019

Time: 3:00 p.m.

28 Place: Courtroom 7C, 350 W. 1st St.
Los Angeles, California 90012

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1 **I. INTRODUCTION**

2 Defendant seeks to mislead the jury at trial by having its lay witness employees
3 give expert opinions about the usability by third parties or the functionality of the
4 minimum viable product (“MVP”) for *artdesigns.com* delivered by Neofonie
5 (Topic 3), and whether or not the MVP was timely and adequately integrated with
6 Defendant’s Microsoft AX software (Topic 9). Such opinion testimony by
7 Defendant’s lay witnesses is improper because it requires the specialized
8 knowledge of an expert.

9 Furthermore, such lay testimony about these topics is also improper because the
10 usability of the MVP by a third party is not within the personal knowledge of
11 Defendant’s lay witness employees. Additionally, the term “usability” is
12 undefined, subjective, and not contained within the parties’ Phase II Agreement.
13 Allowing such testimony would be highly prejudicial to Neofonie as it would
14 mislead and confuse the jury into believing that the parties’ agreed to adhere to a
15 subjective and undefined standard not contained within the Phase II Agreement
16 with respect to the delivery of the MVP.

17 In its opposition, Defendant concedes that it has abandoned and will not offer
18 any testimony regarding many of the theories asserted in its Counterclaim,
19 including:

20 (Topic 1): Whether Neofonie complied with basic usability principles in
21 developing the MVP;

22 (Topic 2): What items, deliverables, features, or sub-features are required for the
23 basic functionality or usability of an e-commerce MVP;

24 (Topic 4): Whether Neofonie used proper judgment in deciding what features of
25 the MVP to develop from scratch;

26 (Topic 5): Whether Neofonie used best practices in developing the MVP;

27 (Topic 6): The process concerning the testing, discovery, and fixing of bugs on

1 an e-commerce MVP project and whether the process at issue was outside of
 2 normal industry standards;

3 (Topic 7): The migration of an MVP from a test environment to a live
 4 environment; and

5 (Topic 8): The frequency and effect of budget and time overruns on an e-
 6 commerce MVP project.

7 Neofonie's motion should be granted as to these topics and an order should issue
 8 barring Defendant from introducing any evidence, including rebuttal evidence,
 9 regarding these topics.

10 In its opposition, Defendant also argues that with respect to Topics 2, 6, 7, and
 11 8, its lay witnesses should be permitted to give testimony regarding these topics to
 12 the extent it relates to the MVP at issue. However, Defendant's lay witnesses
 13 should not be permitted to give opinions regarding these topics as they relate to the
 14 MVP at issue that are not rationally based on their perception or which require
 15 specialized knowledge. For example, conclusory, lay opinion testimony about the
 16 number of bugs, their severity, or how easily they can or cannot be fixed should not
 17 be permitted.

18 II. ARGUMENT

19 A. Defendant Should Not Be Permitted To Offer Any Testimony 20 Regarding Topics 1, 2, 4, 5, 6, 7 and 8.

21 In its opposition, Defendant states that it has abandoned the theories alleged
 22 in its Counterclaim relating to topics 1, 4, and 5 and that it does not intend to offer
 23 any testimony at trial relating to these topics. Defendant also states in its
 24 opposition that to the extent Topics 2, 6, 7, and 8 relate to an industry standard
 25 MVP, it does not intend to offer any testimony regarding these topics.

26 An order should therefore issue barring Defendant from introducing any
 27 evidence at trial, including rebuttal evidence, relating to topics 1, 2, 4, 5, 6, 7 and 8.

1 **B. Defendant's Lay Witness Employees Should Not Be Permitted To**
2 **Give Opinion Testimony Regarding The Usability By Third**
3 **Parties And Functionality Of The MVP (Topic 3).**

4 The usability of the MVP by Defendant's third party customers is not within
5 the personal knowledge of Defendant's employees. (See Fed.R. Evid. 602 – which
6 requires witnesses to have personal knowledge of the matters to which they testify.)
7 Such opinion testimony regarding this issue is simply too speculative, lacking in
8 probative value, and prejudicial to Neofonie to be admissible.

9 Additionally, opinions from Defendant's lay witness employees about the
10 usability or functionality of the MVP would require scientific, technical, and other
11 specialized knowledge. The term usability would need to be properly defined,
12 third parties would need to be clearly identified, polled, interviewed, and/or have at
13 least attempted to use the MVP in order for an opinion to be given on their behalf
14 as to its usability.

15 Furthermore, with respect to functionality in software development, because
16 this refers to how software components interact with each other, and requires an
17 interface among people, machines, and software systems, opinion testimony as to
18 functionality therefore requires the skill and knowledge of an expert. The limited
19 perception of lay witnesses is both unhelpful and insufficient to form conclusions
20 about the functionality of the MVP.

21 **C. Nor Should Defendant's Lay Witnesses Be Permitted To Give**
22 **Opinion Testimony Regarding Whether Neofonie Timely Or**
23 **Adequately Integrated The MVP With Defendant's AX Software**
24 **(Topic 9).**

25 Defendant seeks to oversimplify the technical aspects of the software
26 development process so its employees can offer opinions based on their personal
27 knowledge on a question that Defendant concedes in advance requires expert

1 knowledge. Defendant realizes that its employees do not have the skill and
2 knowledge to understand the integration of software components, here the
3 integration of Defendant's AX software with the MVP. Despite acknowledging
4 that expert knowledge is required, it claims that "whether it worked" (presumably
5 the integration) is a simple question upon which a lay person can offer an opinion.
6 As previously stated the interaction of software components that occurs when they
7 are integrated, speaks to functionality, requiring an expert's opinion to be helpful
8 rather than confusing to a jury.

9 **D. Defendant's Lay Witnesses Should Also Be Precluded From**
10 **Giving Expert Opinion Testimony Regarding Topics 2, 6, 7 and 8**
11 **As It Relates To The MVP.**

12 Defendant's lay witnesses should be barred from offering opinions that
13 require expert knowledge such as which software features were required for the
14 functionality or usability of the MVP for the reasons set forth in Section III B
15 above.

16 Nor should they be able to testify regarding the severity of bugs, and how
17 easily fixable they were, the migration process of the MVP from a test environment
18 to a live environment, and the effect of time overruns in this case. These matters
19 require specialized knowledge to assist the jury in understanding how the
20 development of an ecommerce MVP must assemble a product that incorporates the
21 interactions of people, software and machines to be functional. Testimony from
22 Defendant's employees recounting their own experiences does not help the jury
23 understand the development process, the integration of software components and its
24 effect, how bugs appear, how serious they are, and how easily fixable they may be.

25 Neofonie does not argue, at this stage, whether or not Defendant's employees
26 have personal knowledge of, at least some, of the issues discussed. Rather,
27 Neofonie argues that Defendant's employees' opinions, based on their personal
28

1 experiences and not on technical and specialized knowledge, are confusing,
2 wasteful, and certainly not helpful to a jury.

3 **E. The Probative Value Of Defendant's Opinion Testimony
4 Regarding Topics 2, 3, 6, 7, 8 and 9 Is Far Outweighed By The
5 Dangers of Confusing The Issues and Misleading The Jury.**

6 Even if evidence is considered relevant, evidence may be excluded when its
7 probative value is substantially outweighed by the danger of unfair prejudice,
8 confusion of the issues, or misleading the jury." Fed. R. Evid.. 403; Dream Games
9 of Arizona, Inc. v. PC Onsite, 561 F.3d 983, 993 (9th Cir. 2009). Evidence has
10 probative value only if it has any tendency to make the existence of any legally
11 necessary proposition in the case more or less likely. Fed. R. Evid. 401-402.

12 The court should exclude Defendant's lay witnesses' opinion testimony
13 because its probative value is far outweighed by the dangers of confusing the
14 issues, misleading the jury, and wasting time. For example, testimony from
15 Defendant's lay witness employees about the usability or functionality of the MVP
16 has little or no probative value as they are not qualified to give such opinions, and
17 the word "usability" is subjective, undefined and not even used in the parties' Phase
18 II Agreement. Allowing such testimony would be highly prejudicial to Neofonie as
19 it would mislead and confuse the jury into believing that the parties' agreed to
20 adhere to a subjective and undefined standard not contained within the Phase II
21 Agreement with respect to the MVP.

22 **III. CONCLUSION**

23 For the foregoing reasons, Neofonie respectfully requests that this Court
24 issue the order *in limine* requested.
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1 Dated: December 31, 2018

2 EMANUEL LAW FIRM

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4 By:/s/
5 Sacha V. Emanuel
Attorneys for Plaintiff

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